July 8, 2002

Honorable Charles Poochigian
5087 State Capitol

PUBLIC WORKS AND PREVAILING WAGES - #24198

Dear Senator Poochigian:

You asked five questions pertaining to the statutory changes made by Chapter 938 of the Statutes of 2001 relating to public works and prevailing wages, which are set forth and discussed below.

By way of background, provisions relating to public works projects are contained in Article 1 (commencing with Section 1720) of Chapter 1 of Pare 7 of Division 2 of the Labor Code' (hereafter Article 1), while provisions relating to the payment of prevailing wages on public works projects are contained in Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 (hereafter Article 2). The term "public works" is defined by Section 1720, which, as amended by Chapter 938 of the Statures of 2001 (hereafter Chapter 938), reads as follows:'

> "1720. (a) As used in this chapter, 'public works' means:
>
> Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this subdivision paragraph, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

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1 All further section references are to the Labor Code, unless otherwise specified.

2 New language added to this section by Chapter 938 is underscored, while language deleted by that stature is shown in strikeout.

~~"(b)~~

"(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

~~"(c)~~

"(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

~~"(d)~~

"(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

~~"(e)~~

"(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

~~"(f)~~

"(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

"(b) For purposes of this section, laid for in whole or in part out of public funds' means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price fees, costs rents, insurance or bond premiums, loans interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

"(c)Notwithstanding subdivision (b):

"(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

"(2) (A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money,

to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project,

then only the public improvement work shall chapter.

"(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project an otherwise private development project shall not thereby become subject to the requirements of this chapter.

"The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is amid for in whole or in part out of public funds.

"(4) Paid for in whole or in part out of public funds' shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

"(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter;

"(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code. financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80 of the Government Code on or before December 31 2003.

"(2) Single-family residential projects financed in whole or in a part through the issuance of qualified revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Codes or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined Section 25 of the Internal Revenue Code that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31 2003.

"(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code Chapter 3-6 of Division 31 (commencing with Section 50199.4 of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31 2003.

"(e) If a statute other than this section or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section applies

this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

"(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1 as amended."

As can be seen, paragraph (1) of subdivision (a) of Section 1720 provides a general definition of the term "public works," while paragraphs (2) to (6), inclusive, of that subdivision provide that certain types of projects are "public works:" Paragraph (1) of subdivision (a) of Section 1720 provides that the term "public works" means "construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." Therefore, under the general definition of this paragraph, a project is classified as a public work only if the project is (1) one for construction, alteration, demolition, installation, or repair work that is (2) performed under a contract, and that is (3) paid for in whole or in part from public funds (subd. (a), Sec. 1720). An existing regulation defines the term "public funds" as "state, local, and/or federal monies" (8 Cal. Code Regs. 16000). In addition, existing administrative interpretations by the department of what constitutes "public funds" indicate that public funds are those funds that are "collected for, or in the coffers of, a public entity" (P.W. No. 93-054, Tustin Fire Station (6/28/94), at p. 9).

With respect to a public works project, Section 1771 requires that, except as to a public works project of $1,000 or less, workers on the project be remunerated with not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work in accordance with specified provisions of law. In addition, Section 1772 specifies that workers employed by contractors and subcontractors in the execution of a contract for public work are deemed to be employed on that public work; therefore, under Section 1771, these workers so employed must also be paid the prevailing rate of per diem wages. These requirements apply only to work performed under contract and do not apply to work carried out by a public agency with its own forces (Sec. 1771). The body awarding any contract for a public work, or otherwise undertaking any public work, is required to obtain from the Director of Industrial Relations (hereafter the director) the general prevailing rate of per diem wages, including those rates for holiday and overtime work, in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract (Sec. 1773).

Existing regulations permit interested parties to request that the director determine whether a particular project is a public work (8 Cal. Code Regs. 16001; see Lusardi Construction Co. v. Aubry (1992) 1 CalAth 976, 988-989 (hereafter Lusardi), upholding the director's authority to make these determinations under this regulation). If a director's determination decision contains a "significant legal or policy determination of general application that is likely to recur," the Department of Industrial Relations (hereafter the department) may, pursuant to Section 11425.60 of the Government Code, designate that

decision as precedential, thereby allowing the department to expressly rely on the decision in future determinations.

With these principles in mind, we separately address each question below.

I. Performance of Construction Work by the State or Political Subdivision in Execution of the Project

The first question asked is what the phrase "performance of construction work by the state or political subdivision in execution of the project" means for purposes of subdivision (b) of Section 1720. As discussed above, paragraph (1) of subdivision (a) of Section 1720 generally classifies a project as a public work only if the project is (1) one for construction, alteration, demolition, installation, or repair work that is (2) performed under a contract, and that is (3) paid for in whole or in part out of public funds. Subdivision (b) of Section 1720 provides that "paid for in whole or in part out of public funds" means, among other things, "performance of construction work by the state or political subdivision in execution of the project."

To ascertain the meaning of a statute, courts begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438). When the language of a statute is clear, its plain meaning should be followed (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Ca1.3d 26, 38). However, the meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible (*People v. King* (1993) 5 CalAth 59, 69). Therefore, we are of the view that, to determine the meaning of this phrase, a court would apply the plain meaning of the terms in that phrase, modified as warranted by the use of that phrase in the context of the law governing public works.

The term "performance" is defined as "the execution of an action" and the "fulfillment of a claim, promise, or request" (Webster's Third New International Dictionary (1986), p. 1678). The term "execution" is defined as the "process of executing: performance" and the verb "execute" is defined as "to carry out fully" and "to do what is provided or required" (Id., at p. 794). The term "project" is defined as "a specific plan or design" and "idea" (Id., at p. 1813). The term "construct" is defined as "to form, make, or create by combining parts or elements" (Id., at p. 489). The term "construction" is also defined in various places in the body of public works and prevailing wage law.' In particular, paragraph (1) of subdivision (a) of Section 1720 provides that "construction" includes work performed

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[3] The committee analyses that accompanied the bill (Senate Bill No. 975 of the 2001-02 Regular Session) that was chaptered as Chapter 938 indicate that one of the purposes of the bill was to provide a definition of "public funds" in conformity with prior precedential coverage decisions made by the department (see, for example, Assembly Committee on jobs, Economic Development and the Economy, Committee Analysis of S.B. 975, July 3, 2001, p. 2).

during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. In addition, several precedential public works decisions issued by the department suggest what types of work may constitute "construction" for purposes of public works law. For example, in 1999, the director found that a project at an elementary school that involved setting, leveling, and securing kitchen equipment, tables, and countertops to walls through the use of hand tools constituted "construction" for purposes of public works laws (P.W. No. 99-024, U.S. Foodservice Contract Design, James Madison Elementary School, San Leandro (9/22/99)). Similarly, the term "political subdivision" is used in prevailing wage and public works statutes (Articles 1 and 2), and is defined by Section 1721 as any county, city, district, public housing authority, state agency, assessment district, or improvement district.

Therefore, we conclude that the phrase "performance of construction work by the state or political subdivision in execution of the project" as used in subdivision (b) of Section 1720 means the performance by an entity of state government or a "political subdivision," as defined in Section 1721, of work on a project by performing design or preconstruction work, including, but not limited to, inspection or land surveying, or by performing any other type of construction as defined in ordinary use and by the public works statutes. When the state or a political subdivision engages in these activities, we are of the opinion that a payment from public funds has occurred for purposes of Section 1720.

11. Equivalent of Money

The second question asked is what the phrase "the equivalent of money" means for purposes of subdivision (b) of Section 1720, and whether nonmonetary general technical assistance provided to a private company by the Technology, Trade, and Commerce Agency pursuant to Section 15364.6 of the Government Code would fall within the ambit of that phrase.

Subdivision (b) of Section 1720 provides that, for purposes of the section, "paid for in whole or in part out of public funds" means, among other things, "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." The phrase "equivalent of money" is not defined in Section 1720. While several California statutes similarly include this phrase or variations on this phrase,[4] neither statute nor regulation defines the phrase or gives any indication as to the phrase's meaning.

As discussed above, in determining the meaning of a statute, courts begin with the language in which the statute is framed (Leroy T. v. Workmen's Comp. Appeals Bd., supra, at

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[4] See, for example, Section *23778* of the Business and Professions Code, Sections *488.395, 676.11,* and *700.070* of the Code of Civil Procedure, Sections *105.2, 1800, 1815,* and *1823* of the Financial Code, Sections *13300* and *14618* of the Government Code, and Section *132.5* of the Penal Code.

p.438). When the language of a statute is clear, its plain meaning should be followed (Droegerv.Friedman, Sloan & Ross, supra, at p. 38). The term "equivalent" is defined as "[equal in value, force, amount, effect, or significance" and "virtually identical" (Black's Law Dictionary (1999), 7th ed., p. 561). The term "money" is defined as a "medium of exchange authorized or adopted by government as part of its currency" and "assets that can easily be converted to cash" (Id., at p. 1021). Therefore, we are of the view that the phrase "equivalent of money," as used in subdivision (b) of Section 1720, means an item that is virtually identical to currency in that it is easily converted into cash.'

We now turn to the question of whether nonmonetary general technical assistance provided to a private company by the Technology, Trade, and Commerce Agency (hereafter the agency) pursuant to Section 15364.6 of the Government Code would fall within the ambit of the phrase "equivalent of money" as used in subdivision (b) of Section 1720. Under that statute, the agency is authorized to engage in a number of activities for the purpose of coordinating activities to expand international trade for the state, including (1) providing information, overseeing funding programs, and obtaining funding to facilitate the international sale of products produced in California (subds. (a), (f), and (g), Sec. 15364.6, Gov. C.), (2) representing the interests of California-based companies at gatherings related to international trade (subds. (b) and (d), Sec. 15364.6, Gov. C.), (3) influencing governmental international trade policies and the enforcement of these policies (subds. (c) and (d), Sec.15364.6, Gov. C.), and (4) establishing offices in California and in other countries to serve these functions (subd. (i), Sec. 15364.6, Gov. C.).

As discussed above, we are of the view that the phrase "equivalent of money," as used in subdivision (b) of Section 1720, means an item that is virtually identical to currency in that it is easily converted into cash. Thus, we conclude that any nonmonetary general technical assistance would be the "equivalent of money" only if that assistance constitutes an item that may be readily converted into cash.

In our opinion, a court would not find that the statutorily authorized assistance activities of the agency amount to an item that may be easily converted into cash. In executing these activities, the agency merely serves as a clearinghouse for information and as an advocacy organization that represents the interests of California-based companies that engage in international trade. The assistance that a private entity could receive from the agency is not of a type that could be easily converted into cash.

Therefore, we conclude that the phrase "equivalent of money," as used in subdivision (b) of Section 1720, means an item that is virtually identical to currency in that it is easily converted into cash. Consequently, we are also of the opinion that nonmonetary general technical assistance provided to a private company by the Technology, Trade, and Commerce Agency pursuant to Section 15364.6 of the Government Code would not constitute the "equivalent of money" for purposes of that subdivision.

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[5] See *McIntosb v. Aubry* (1993) 14 Ca1.AppAth 1576, 1588 (hereafter *McIntosb).*

111. Qualified Small Issue Industrial Development Bonds

The third question asked is whether a person or entity performing a construction project, other than a project described in paragraphs (1) and (2) of subdivision (d) of Section 1720, that is financed through the issuance of qualified small-issue industrial development bonds (hereafter QSIIDBs) would be required to comply with prevailing wage laws in the performance of that project. As discussed below, we are of the opinion that subdivision (1) of Section 91533 of the Government Code subjects to prevailing wage requirements those construction projects, other than a project described in paragraphs (1) and (2) of subdivision (d) of Section 1720, that are financed in whole or in part through the issuance of QSIIDBs.

The California Debt Limit Allocation Committee (subd. (a), Sec. 8869.83, Gov, C.; hereafter CDLAQ, among other duties, administers the California Industrial Development Financing Act (Sec. 91500, Gov. C.; hereafter the Act) which provides for the issuance of tax-exempt private activity bonds that include, among other types of bonds, QSIIDBs (subd. (g), Sec. 8869.82, Gov, C.). The Internal Revenue Code defines a qualified small issue bond as a bond of up to $10,000,000 that is issued and from which 95 percent of the proceeds will be used for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation (26 LR.C. 144(a)(1)-(4)). The Act authorizes each public agency, which is defined as "any county, city and county, city, or redevelopment agency" (subd. (q), Sec. 91504, Gov. C.), to issue bonds, until December 31, 2003 (Sec. 91521.3, Gov. C.), in accordance with the Act (subd. (a), Sec. 91520, Gov. C.) to fund "projects," which are defined by the Act as "the acquisition of facilities by the issuance of bonds upon the application of and to be repaid by payments from a company for the purposes of this title" (subd. (n), Sec. 91504, Gov. C.). Public agencies may issue these bonds for these purposes on their own accord, or through the creation of an industrial development authority (Sec. 91520, Gov. C.).

Particularly relevant here is a provision in the Act that expressly requires that prevailing wages be paid to workers on certain projects financed with revenues from bonds issued pursuant to the Act. In this regard, subdivision (1) of Section 91533 of the Government Code provides as follows:

°91533. Authorities shall undertake projects by entry into project agreements in substance not inconsistent with the following:

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"(1) Authorities [or public agencies] shall require, whether or not authorities, companies, or others are the contract awarding bodies, that on any construction, improvement, reconstruction, or rehabilitation financed in whole or in part by means of bonds issued pursuant to this title, the resolution of intention for which is adopted on or after January 1, 1983, all workers employed in that work, exclusive of maintenance work, shall be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the

general prevailing rate of per diem wages for holiday and overtime work. Those rates shall be determined by the Director of the Department of Industrial Relations in accordance with the standards set forth in Section 1773 of the Labor Code. The director's determination shall be final, and Sections 1773.1, 1773.5, 1774 and 1776 (excepting subdivision (f)) of the Labor Code shall apply." (Emphasis added.)

As can be seen, subdivision (1) of Section 91533 of the Government Code requires public agencies that issue bonds pursuant to the Act (on their own accord or through the creation of an industrial development authority) to mandate that workers on construction that is financed through those bonds be paid prevailing wages, as determined by the director pursuant to Section 1773. Moreover, neither subdivision (1) of Section 91533 of the Government Code nor any other provision of that section exempts projects financed through the issuance of QSIIDBs from these requirements.

Therefore, we conclude that a person or entity performing a construction project, other than a project described in paragraphs (1) and (2) of subdivision (d) of Section 1720, that is financed through the issuance of qualified small-issue industrial development bonds would be required to pay prevailing wages to workers on that project pursuant to subdivision (1) of Section 91533 of the Government Code.

IV. Grant of State Dollars

The fourth question asked is whether a person or entity that receives a grant of state dollars would be required to comply with prevailing wage laws when utilizing those dollars in the conduct of a trade or business, if the grant funds are utilized in a project that is not performed pursuant to a contract with the state or a political subdivision thereof, or a subcontract that is derivative of that contract. This question raises an issue of whether a person or entity's receipt of state grant dollars would transform into a public work any trade or business activity of that person or entity that is not otherwise classified as a public work. We are of the view, for the reasons discussed below, that while state grant dollars are "public funds" for purposes of Section 1720, the receipt by a person or entity of these public funds does not, by itself, transform all trade or business activities of that person or entity into public works on which prevailing wages are required to be paid to workers.

A. When is a Project a "Public Work"?

Under the public works and prevailing wage laws, a project is a public work only if it meets the various statutory definitions of what constitutes a "public work." As discussed above, paragraph (1) of subdivision (a) of Section 1720 provides a general definition of projects that are public works; under this paragraph, a project is a public work only if it is a project (1) for construction, alteration, demolition, installation, or repair work that is (2) performed under a contract, and is (3) paid for in whole or in part out of public funds (para. (1), subd. (a), Sec. 1720). As further discussed above, paragraphs (2) to (6), inclusive, of subdivision (a) of Section 1720 specify certain types of projects that are public works.

Sections 1720.2 and 1720.3 also specify certain types of projects that are public works. Section 1720.2 provides as follows:

"1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist:

"(a) The construction contract is between private persons.

"(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

"(c) Either of the following conditions exist:

"(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

"(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

As can be seen, Section 1720.2 specifies conditions under which contracts wholly between private parties are public works contracts. Because these types of contracts are public works contracts, if the contract price exceeds $1,000 workers performing work under these contracts must be paid prevailing wages pursuant to Section 1771.

Section 1720.3 additionally specifies a type of project that is a public work. Section 1720.3 reads as follows:

"1720.3. For the limited purposes of Article 2 (commencing with Section 1770), `public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state."

Section 1720.3 provides that the hauling of refuse to an outside disposal facility from a site on which a public work is being performed also is classified as a public work. Therefore, pursuant to Section 1771, if the contract price exceeds $1,000 workers engaged in this type of work must be paid prevailing wages.

Thus, a project is a "public work" on which workers must be paid prevailing wages only if that project costs over $1,000 (Sec. 1771) and meets one of the definitions of a "public work" as provided in Section 1720, 1720.2, or 1720.3. As illustrated above, among those definitions, paragraphs (1), (4), and (5) of subdivision (a) of Section 1720 define a project as a public work if, among other things, the project is paid for from public funds and is performed under contract. As we discuss below, while we are of the view that a person or entity that receives state grant dollars has received public funds, those definitions do not provide that this payment, by itself, transforms all trade or business activities of that person or entity into

public works on which prevailing wages must be paid to workers. Instead, the public funds must be used to pay for the specific types of work described in, and performed under those circumstances described in, the various statutes that define a "public work." In particular, to be classified as a public work under paragraphs (1), (4), or (5) of subdivision (a) of Section 1720, we conclude, as discussed below, that work of a type described in any of those paragraphs must be performed pursuant to a contract with the state or a political subdivision of the state, or pursuant to a subcontract that is derivative of that contract, that is paid for from public funds.

B. Work Performed "Under Contract" Refers to Work Performed on a Project Undertaken Pursuant to a Contract with the State or a Political Subdivision of the State

Paragraphs (1), (4), and (5) of subdivision (a) of Section 1720 specify that a project is a public work only if the described work is paid for from public funds and is performed "under contract." It is our view, set forth below, that the term "under contract" as used in Section 1720 means that the work is performed as part of a project that is undertaken pursuant to a contract with the state or a political subdivision of the state, including work performed under a subcontract that is derivative of that contract (see Sec. 1772). As a result, it is also our view that the receipt of public funds by a person or entity does not, by itself, transform the trade or business activities of that person or entity into public works on which workers must be paid prevailing wages. In our opinion, a project is a public work under paragraphs (1), (4), and (5) of subdivision (a) of Section 1720 only if the project is (1) for a type of work described in those paragraphs, and is (2) performed as part of a project that is undertaken pursuant to a contract with the state or a political subdivision that is (3) paid for from public funds.

To determine the meaning of a statute, courts begin with the language in which the statute is framed and construe those words in context with provisions relating to the same subject matter (*Leroy T. v. Workmen's Comp. Appeals Bd.,* supra, at p. 438; People v. King, supra, at p. 69). The term "under contract" is not defined in California's public works law. The term "contract" is defined as "[a]n agreement between two parties creating obligations that are enforceable or otherwise recognizable at law" (Black's Law Dictionary (1999), 7th ed., p. 318). Thus, the plain meaning of the term "contract" includes an agreement between any two parties.

Moreover, Section 1720 does not expressly require that the state or a political subdivision be a party to a contract in order for the contract to be one for a public work. In that respect, although the court's statement was not part of the reasoning upon which its decision was based, at least one court has stated that California's public works law does not "contain a specific clause limiting it to contracts to which the state of California or a political subdivision thereof is a party" (*Southern Cal. Labor Management Operating Engineers Contract Compliance Com. v. Aubry* (1997) 54 Cal.AppAth 873, 883).

However, for the reasons set forth below, it is our opinion, construing Section 1720 within the context of the entire scheme of related statutes governing public works and prevailing wage requirements, that the term "under contract," as used in Section 1720, refers

to a contract with the state or a political subdivision of the state, or a subcontract that is derivative of that contract, and does not, except in limited specified circumstances, include a contract between private parties.

As quoted above, Section 1720.2 specifies those circumstances under which contracts wholly between private parties are deemed public works contracts, such that these "private contracts" are subject to prevailing wage requirements: when the contract cost exceeds $1,000 and more than 50 percent of the constructed property is leased to the state or a political subdivision, and the lease agreement preceded the construction work or the work is performed to specifications furnished by the state or political subdivision (subds. (b) and (c), Sec. 1720.2). In our view, the enactment of Section 1720.2, to specifically designate a private contract as a public works contract if certain criteria are met, indicates that the Legislature intended to apply the "public works" designation to wholly private contracts only under these specified circumstances indicating that the benefit of the private construction contract accrues to the state or a political subdivision.

In addition, the language in other public works statutes supports the conclusion that a "public work" generally requires a contract with a governmental entity. For example, Section 1724 provides as follows:

"1724. `Locality in which public work is performed' means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases." (Emphasis added.)

Section 1724 defines "locality in which the public work is performed" for purposes of Section 1771, which requires the payment of prevailing wages to workers employed on public works contracts and specifies that the prevailing wage is the "rate of per diem wages for work of a similar character in the locality in which the public work is performed." As can be seen from the underscored text, Section 1724 does not contemplate that any entity other than a public entity awards public works contracts. As a result, Section 1724 indicates, in our view, that the Legislature presumed that public works contracts on which workers are required to be paid prevailing wages are those contracts, and their derivative subcontracts, that are performed pursuant to an agreement with either the state or a political subdivision of the state.

Additional support in statute for this conclusion is found in the various references to the term "awarding body" in public works and prevailing wage laws. An "awarding body" is defined in Section 1722 as follows:

"1722. `Awarding body' or 'body awarding the contract means department, board, authority, officer or agent awarding a contract for public work."

When this term is considered in context with other public works statutes, especially Section 1724, we are of the view that a public works contract is deemed to involve an "awarding body," and that this term, as used in Section 1722, refers to a public entity such

as the state or a political subdivision thereof. Section 1724 refers to contracts "awarded by the State" and the "political subdivision on whose behalf the contract is awarded" (emphasis added). Similarly, Section 1727 provides that "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter" (emphasis added). In addition, when discussing the responsibilities of awarding bodies, a court has stated that a " public entity awarding a contract for public work must obtain prevailing wage data from the Director" and specify these wages in its call for bids (*Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Ca1.AppAth 345, 351; emphasis added; see Sec. 1772; emphasis added). Therefore, the term "awarding body," when viewed in the context of other public works laws, means, in our opinion, the state or a political subdivision thereof.

In addition to those provisions defining a "public work," statutes concerning the application and enforcement of prevailing wage laws also support the conclusion that a public work generally requires a contract with a governmental entity, and that the mere receipt of public funds by a person or entity does not transform all trade or business activities of that person or entity into "public works" on which prevailing wages must be paid to workers.

For example, Section 1771, which requires that workers on public works be paid prevailing wages, provides that this requirement "is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces" (emphasis added). This language was added to Section 1771 to codify the California
Supreme Courts decision in *Bishop v. City of San Jose* (1969) 1 Ca1.3d 56 (hereafter *Bishop*). (O.G. *Sansome v. Department of Transportation* (1976) 55 Cal.App.3d 434, 459; hereafter Sansome). In *Bishop*, the plaintiff contended that the City of San Jose was required to pay prevailing wages to the electricians on its own workforce (*Bishop*, supra, at p. 60). The court held that prevailing wage obligations attach only when "public work is let out to contract" and does not attach when a city performs work with its own forces (*Bishop*, supra, at p. 64; emphasis added). According to the court, "the entire tenor ... [of the state's public works and prevailing wage laws] discloses a legislative purpose to deal only with contracted public work, and not work done by a municipality by force account' (Ibid.; emphasis added). Both the language of Section 1771 and the language in the Bishop case support the conclusion that it is only when public agencies contract with other parties to perform work that that work can become a "public work" to which prevailing wage obligations attach.

By way of further example, Section 1777 establishes criminal penalties for violation of prevailing wage laws, and provides as follows;

"1777. Any officer, agent, or representative of the State or of any political subdivision who willfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor." (Emphasis added.)

As can be seen, this section provides that an officer, agent, or representative of the state or a political subdivision thereof who willfully violates the state's prevailing wage laws is guilty of a misdemeanor. This section also provides that public works contractors, subcontractors, and their agents and representatives, who fail to comply with Section 1776 are also guilty of a misdemeanor. Thus, this section provides for a criminal penalty with respect to parties to a public works contract. Because Section 1777 provides these penalties against (1) public entities and their officers, agents, and representatives, and (2) public works contractors and subcontractors and their agents and representatives, this section implies a statutory scheme that presumes that the parties to public works contracts are public entities and contractors. Section 1777 does not contemplate penalties against any other type of party. Again, this provision of the statutory scheme concerning prevailing wages suggests, in our view, that public works contracts are those that are awarded by a state or political subdivision thereof and subcontracts that are derivative of those contracts.

This same conclusion is supported by Section 1775, which allows a penalty to be assessed against any public works contractor or subcontractor that fails to comply with the state's prevailing wage law, and provides in pertinent part as follows:

"1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her.

* * " (Emphasis added.)

Similarly, subdivision (g) of Section 1776 provides as follows:

"(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section." (Emphasis added.)

These sections expressly refer to withholding of penalties to be paid to the state or political subdivision on whose behalf the contract is made or awarded. In our opinion, these

references suggest that, when viewed in the context of the statutory scheme governing the payment of prevailing wages to workers employed on public works, "under contract' as used in Section 1720 refers to contracts to which a public entity is a party and any subcontracts that are derivative of that contract (see Sec. 1772). It follows, in our view, that the receipt of public funds by a person or entity does not, by itself, transform all trade or business activities of the recipient of those funds into public works.

This conclusion is further supported by the fact that certain statutes that provide payment "in whole or in part out of public funds," within the meaning of Section 1720, to pr ivate entities for "construction" projects expressly state that prevailing wages must be paid to workers when the recipient uses the funds for these construction projects. For example, Chapter 6.7 (commencing with Section 50675) of Part 2 of Division 31 of the Health and Safety Code creates the Multifamily Housing Program (hereafter the MHP). Under the MHP, a "sponsor," which may include a private entity,6 may receive, for the construction of residential housing, loans from the Department of Housing and Community Development at interest rates that may be below prevailing market interest rates: Subdivision (b) of Section 1720 specifies that when a public entity makes loans at interest rates that are charged at less than fair market value, the making of such a loan constitutes payment "in whole or in part out of public funds" for purposes of determining whether a project is a "public work." Thus, under the MHP, "construction" that is "paid for in whole or in part out of public funds" may, in some instances, be performed by a private entity. Notwithstanding this circumstance, Section 50675.4 of the Health and Safety Code expressly requires that, to be eligible for these

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[6]Subdivision (g) of Section 50675.2 of the Health and Safety Code defines "sponsor" by reference to Section 50669 of that same code and provides that a sponsor also includes "a limited partnership in which the sponsor or an affiliate of the sponsor is a general partner." Subdivision (c) of Section 50669 of the Health and Safety Code defines a sponsor as follows:

"(c)'Sponsor' means any individual, joint venture, partnership, limited partnership, trust, corporation, cooperative, local public entity, duly constituted governing body of an Indian reservation or rancheria, or other legal entity, or any combination thereof, certified by the department as qualified to own, manage, and rehabilitate a rental housing development. A sponsor may be organized for profit or limited profit or be nonprofit."

Subdivision (c) of Section 50675.6 of the Health and Safety Code specifies that loans under the MHP "shall bear interest at the rate of 3 percent per annum on the unpaid principal balance." Thus, at any time in which this rate of interest is less than the interest rate a sponsor would be charged in an arm's-length transaction, the "interest rates" charged under the MHP would be "charged at less than fair market value" for purposes of Section 1720 and would, therefore, constitute payment "in whole or in part out of public funds" for purposes of that section (subd. (b), Sec. 1720).

loans, sponsors must agree to remunerate workers on that construction with not less than the prevailing rate of per diem wages (para. (2), subd. (c), Sec. 50675.4, H.& S.C.).

In our view, the Legislature determined that, in order to require the payment of prevailing wages in this context, it had to expressly provide that prevailing wages be paid by private sponsors of these construction projects because, lacking a contract with a public entity, these projects would not otherwise be public works to which prevailing wage obligations would attach.' Stated another way, while MHP construction projects executed by private sponsors involve (1) "construction," within the meaning of Section 1720, that is (2) "paid for in whole or in part out of public funds," within the meaning of Section 1720, they are performed pursuant to a contract involving only private entities, and thus are not performed "under contract" within the meaning of Section 1720. Consequently, the prevailing wage requirement expressly provided for in Section 50675.4 of the Health and Safety Code was necessary to implement the Legislature's policy to attach prevailing wage obligations to these projects.

It is a cardinal rule of statutory construction that the Legislature is presumed not to have indulged in idle acts *(Silberg v. Anderson* (1990) 50 Cal.3d 205, 216). In addition, when construing a statute, significance should be given to every word, and a construction that renders some words surplusage is to be avoided.

Applying these principles to Section 50675.4 of the Health and Safety Code, we are of the view that if MHP construction projects involving only private entities were public works to which prevailing wage obligations would attach if the project cost exceeds $1,000, then explicitly requiring the payment of prevailing wages on these projects pursuant to Section 50675.4 of the Health and Safety Code would be unnecessary surplus language.

As discussed in Part III above, subdivision (1) of Section 91533 of the Government Code expressly requires the payment of prevailing wages to workers employed on construction projects that are financed from revenue derived from bonds issued pursuant to the California Industrial Development Financing Act (hereafter the Act). Much like the MHP, the Act provides that private "companies" are eligible to receive this funding from public entities for construction projects! If a public entity pays these bond proceeds directly

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[8]Section 1771 imposes prevailing wage obligations upon public works that exceed $1,000 in cost.

9 Subdivision (h) of Section 91504 of the Government Code defines "company" as

"(h) "Company" means a person, partnership, corporation, whether for profit or not, trust, or other private enterprise of whatever legal form, for which a project is undertaken or proposed to be undertaken pursuant to this title or which is in possession of property owned by an authority, and may include more than a single enterprise."

to or on behalf of a construction contractor, subcontractor, or developer, then a payment "in whole or in part out of public funds" has occurred for purposes of subdivision (b) of Section 1720. Thus, in an instance in which construction was performed with financing provided under the Act, (1) "construction" occurred, within the meaning of Section 1720, that was (2) "paid for in whole or in part out of public funds," within the meaning of Section 1720. In our view, however, because a "company" is a private entity under the Act, any construction that occurs would be under private contract and would not, for that reason, constitute a "public work." Thus, it is our opinion that subdivision (1) of Section 91533 was necessary to implement the Legislature's policy to attach prevailing wage obligations to these projects because, lacking an agreement with a public entity, these construction projects would not meet the statutory definition of a "public work" to which prevailing wage obligations would attach.

We think that the express application of prevailing wage requirements in Section 50675.4 of the Health and Safety Code and Section 91533 of the Government Code indicates that construction projects that are paid for in whole or in part out of public funds but are not performed pursuant to an agreement with a public entity, are not thereby deemed "public works" projects, and are not subject to prevailing wage requirements unless another provision of law expressly makes those requirements applicable to those particular projects.

This conclusion is supported by an appellate court's statement in the case *of Independent Roofing Contractors v. Department of Industrial Relations*, supra (hereafter *Roofing Contractors*). In discussing the purpose of the state's public works and prevailing wage laws, the court stated that these laws were based on the "premise that government contractors should not be allowed to circumvent locally prevailing labor market conditions by importing cheap labor from other areas" (*Roofing Contractors*, supra, at p. 356; emphasis added). Other statements by courts in cases concerning public works and prevailing wages, although not directly part of the courts' reasoning in reaching their decisions, further support the same conclusion. For example, in *Chamber of Commerce v. Bragdon* (9th Cir. 1995) 64 F.3d 497 (hereafter Bragdon), the United States Court of Appeals for the Ninth Circuit considered a federal preemption challenge to a Contra Costa County ordinance that required the payment of prevailing wages on certain construction projects that were performed pursuant to a contract between private parties. In holding that the county ordinance was preempted by federal law, the court stated that prevailing wage laws were "developed for use by governmental entities when they are acting as proprietors and participants in the marketplace" (emphasis added; Bragdon, supra, at p. 501). In our opinion, this statement suggests that public works contracts are those involving a governmental entity. Similarly, in *Sansome*, supra, a California appellate court, in examining the purposes of the state's public works and prevailing wage laws, stated that "prevailing wage legislation was designed to benefit the construction worker on public construction projects" (emphasis added; *Sansome,* supra, at p. 461). In our view, this generic reference to "public construction projects" suggests that, except as otherwise provided in Section 1720.2 or in other statutes not contained in Article 1 or 2 (for example, Sec. 50675.4, H.& S.C.), private contracts are not public works

contracts on which workers must be paid prevailing wages unless they are subcontracts that are derivative of a contract with the state or a political subdivision of the state.

In contrast to the foregoing discussion, recent precedential, administrative decisions indicate that the director of the department is of the view that subdivision (a) of Section 1720 does not require that a public entity or an awarding body be a party to a contract for a project performed under that contract to be deemed a public work (P.W. No. 99-052, Lewis Center for Earth Sciences Construction (11/12/99) at p. 2 (hereafter Lewis Center decision); P.W. No. 2000-006, SPCA-LA Companion Animal Village and Education Center (8/24/01) at pp. 6-7 (hereafter SPCA-LA decision). In this regard, the contemporaneous administrative construction of an enactment by the agency charged with its enforcement is entitled to deference by the courts (*People ex rel. Lungren v. Superior Court* (1996) 14 Ca1Ath 294, 309). However, the degree of deference afforded by the courts to an administrative interpretation depends upon the character of that interpretation (*Yamaba Corp. v. State Bd. of Equalization* (1998) 19 CalAth 1, 7; hereafter *Yamaba*). Quasi-legislative interpretations, such as regulations enacted under an agency's rulemaking authority conferred upon that agency by the Legislature or interpretations derived from an adversarial administrative adjudication, are afforded the highest degree of deference by the courts and will not be disturbed unless either the interpretation is outside the scope of the authority conferred by the Legislature, or the interpretation is arbitrary, capricious, and without a reasonable basis (Id., at pp. 11-14). On the other hand, administrative interpretations of statutes that do not rise to the level of the quasi-legislative interpretations described above are afforded a lesser degree of deference by the courts (Id., at p. 11). To determine the degree of deference that should be afforded to an administrative interpretation, a court looks to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control" (Id., at pp.14-15).

In the Lewis Center decision, a private nonprofit foundation that operated a charter school contracted with a private contractor for the construction of a science center. The Legislature had appropriated to the City of Apple Valley certain moneys that were used to fund the construction of the center. The director concluded that the project was a public work because the building of the science center involved construction that was performed under a contract that was paid for from public funds. The director, without analysis, stated that "Section 1720(a) does not require that a public entity be a party to a construction contract for a project to be deemed a public work" (Lewis Center decision, supra, at p.2). Apparently, this statement was based upon a literal construction of the language of subdivision (a) of Section 1720. In support of this construction, the director cited *Lusardi*, supra, and a prior decision by the department that is no longer designated as precedential..[10]

'° The director cited the decision in P.W. 93-039, Valley Rose Estates Project-City of Wasco (8/26/95). In his citation to this decision, the director states that this decision was a (continued...)

In *Lusardi,* supra, the court did not consider the issue of whether a public entity must be a party to a contract for that contract to be classified as a public works contract. In this connection, a cardinal rule of stare decisis is that a case may not be relied upon for propositions not considered (*People v. Mendoza* (2000) 23 CalAth 896, 915). Moreover, the construction work in *Lusardi* was performed pursuant to a subcontract that was derivative of a contract to which a public entity (a public hospital district) was a party (*Lusardi*, supra, at p. 983).

In the SPCA-LA decision, the director reached a similar conclusion-apparently based on a literal reading of Section 1720-with little or no analysis. In that decision, a private nonprofit corporation contracted with a private contractor to construct an animal shelter and an office for the corporation's headquarters. The construction project was funded by a combination of grant moneys from the City of Los Angeles and private donations. The director concluded that the project was a public work because the construction of the shelter and office involved construction that was performed under a contract that was paid for in part from public funds. The director stated that "[prevailing wages can be required when the contracting parties are private organizations but the money is public" (SPCA-LA decision, supra, at p. 7). The authorities upon which the conclusion relies are (1) the Lewis Center decision, discussed above, and (2) precedential public works decision 96-006 (P.W. No. 96-006, Department of Corrections, Community Correctional Facilities (6/11/96) (hereafter CDC decision). In the CDC decision, the director specifically found that the California Department of Corrections (CDC) was the awarding body of the contract at issue; in addition, CDC was a party to the contract from which the decision arose (CDC decision, supra, at p. 10).

In our view, a court applying the principles enunciated in the *Yamaha* case would afford little deference to the Lewis Center decision and the SPCA-LA decision, because they do not rise to the level of quasi-legislative interpretations. Those decisions were not promulgated under the departments rulemaking authority, nor were they the byproduct of an adversarial administrative adjudication (see *Yamaha*, supra, at p. 14). Applying the principles enunciated in *Yamaha*, a court would examine the thoroughness and validity of the director's reasoning in reaching those decisions, in order to determine the degree of deference to be given to those decisions (*Yamaha*, supra, at pp. 14-15). As indicated above, the conclusions in those decisions were proffered with little or no supporting analysis or authority. In this connection, the conclusions in those decisions are literal interpretations of the phrase "under contract" that do not construe that phrase in the context of the prevailing wage provisions to which it relates. Consequently, it is our view that a court would, in

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(...continued) precedential decision, yet the decision is not listed on the departments Internet Web site index of precedential decisions. We are informed by staff counsel that this decision was recently removed from the list of the department's precedential decisions for reasons that are unrelated to this discussion.

construing the phrase "under contract" as used in subdivision (a) of Section 1720, consider those decisions with no more than a very limited degree of deference. We think, in light of those factors discussed above that support a different construction, that a court would conclude that the phrase "under contract" as used in subdivision (a) of Section 1720 refers to a contract to which the state or a political subdivision is a party and subcontracts that are derivative of that contract.

Therefore, it is our opinion that, when viewed in the context of public works and prevailing wage statutes and decisional law, the term "under contract" as used in paragraphs (1), (4), and (5) of subdivision (a) of Section 1720 refers to a contract to which the state or a political subdivision thereof is a party, and subcontracts that are derivative of that contract.

C. State Grant Dollars are Public Funds

We now address whether the term "public funds," as used in Section 1720, includes state grant dollars. As discussed above, Section 1771 requires that workers engaged in the performance of a public work, the cost of which exceeds $1,000, are to be paid prevailing wages, and subdivision (b) of Section 1720 specifies that, for purposes of classifying a project as a public work, "paid for in whole or in part out of public funds" includes "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." As also discussed above, we are of the view that the phrase "money or the equivalent of money" means currency or an item easily convertible into cash. Also, state regulations specify that "public funds" includes state moneys (8 Cal. Code Regs. 16000). Therefore, if a person or entity receives a grant of state dollars, those dollars are "public funds," as specified in subdivision (b) of Section 1720 and in state regulations pertaining to public works (Ibid.). Consequently, if state grant dollars are paid directly to or on behalf of a public works contractor, subcontractor, or developer, that payment constitutes payment "in whole or in part out of public funds" for purposes of Section 1720.

With that said, however, we are of the view, as set forth above, that the receipt by a person or entity of a payment of public funds does not, by itself, transform all of the trade or business activities of that person or entity into public works on which prevailing wages must be paid to workers engaged in those activities. A project is a "public work" on which prevailing wages must be paid to workers only if the project meets the definition of "public works" as provided in Section 1720, 1720.2, or 1720.3, and the cost of the project exceeds $1,000.

Therefore, we conclude that a project is a public work under paragraph (1), (4), or (5) of subdivision (a) of Section 1720 only if the project is for a type of work described in that paragraph, performed pursuant to a contract with the state or a political subdivision or a subcontract that is derivative of that contract, that is paid for in whole or in part from public funds, which would include state grant dollars if those dollars are paid directly to or on behalf of a public works contractor, subcontractor, or developer.

V. Paid for in Whole or in Part out of Public Funds

The fifth question asked is whether the phrase "paid for in whole or in part out of public funds," as used in subdivision (b) of Section 1720, would include either of the following:

(A) State tax deductions or credits utilized by a taxpayer under the Personal Income Tax Law (Pt. 10 (commencing with Sec. 17001), Div. 2, R.& T.C.) or the Bank and Corporation Tax Law (Pt. 11 (commencing with Sec. 23001), Div. 2, R.& T.C.).

(B) The benefits derived by a wholly private construction project from the construction of streets, sewers, or other public works construction that occurs on property that is adjacent to the private construction project.

As discussed above, except for specified projects described in paragraphs (2) to (6), inclusive, of subdivision (a) of Section 1720 or Section 1720.2 or 1720.3, the general rule contained in paragraph (1) of subdivision (a) of Section 1720 provides that a project is public work only if the project is (1) one for construction, alteration, demolition, installation, or repair work that is (2) performed under a contract, and is (3) paid for in whole or in part out of public funds (para. (1), subd. (a), Sec. 1720).

As also discussed above, subdivision (b) of Section 1720 provides a definition of the phrase "paid for in whole or in part out of public funds" for purposes of paragraph (1) of subdivision (a) of that section. Subdivision (b) of Section 1720 provides as follows:

"(b) For purposes of this section, `paid for in whole or in part out of public funds' means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations."

As can be seen, subdivision (b) of Section 1720 uses the term "means" rather than the broader term "includes" with respect to what constitutes "paid for in whole or in part out of public funds." Because of this terminology, we are of the opinion that subdivision (b) of Section 1720 constitutes a comprehensive statutory definition of the term "paid for in whole or in part out of public funds." In addition to this definition, existing regulations and department interpretations of the meaning of "public funds" for purposes of public works laws state that "public funds" include state, local, and federal moneys that are collected for, or in the coffers of, a public entity (8 Cal. Code Regs. 16000; P.W. No. 93-054, Tustin Fire Station (6/28/94), at p. 9). Therefore, a construction project is "paid for in whole or in part out of public funds" only if the state or a political subdivision delivers public funds or their

equivalent to a public works contractor, subcontractor, or developer, or engages in any of those activities described in subdivision (b) of Section 1720.

A. State Tax Deductions and Credits

The first part of this question concerns whether the phrase "paid for in whole or in part out of public funds" would include a situation in which a taxpayer utilizes state tax deductions or credits under the Personal Income Tax Law (Pt. 10 (commencing with Sec. 17001), Div, 2, R.& T.C.) or the Bank and Corporation Tax Law (Pt. 11 (commencing with Sec. 23001), Div. 2, R.& T.C.).

By way of background, the California Constitution provides that taxes on or measured by income may be imposed on persons, corporations, or other entities as prescribed by law (subd. (a), Sec. 26, Art. XIII, Cal. Const.). However, the power of the Legislature to impose an income tax is inherent, and it may impose such a tax independently of express constitutional authority *(Tetreault v. Franchise Tax Board* (1967) 255 Ca1.App.2d 277, 280). In the exercise of its power to tax, the Legislature's power is limited only in that it must be used in aid of a public object-one that is within the purpose for which governments are established *(City of Los Angeles v. Lewis* (1917)175 Cal. 777, 779-780) and that is not expressly prohibited by the Constitution *(Nougues v. Douglass* (1857) 7 Cal. 65, 70-71). Moreover, the Legislature is accorded broad discretion in establishing tax policy and determining whether or not a taxing statute effects a public purpose *(Crocker-Anglo Nat. Bank v. Franchise Tax Board* (1960) 179 Ca1.App.2d 591, 594-595).

California has imposed a tax on personal income since 1935 (Ch. 329, Stars. 1935), and these tax provisions are presently found in the Personal Income Tax Law, which is contained in Part 10 (commencing with Section 17001) of Division 2 of the Revenue and Taxation Code (hereafter the Personal Income Tax Law).

In addition, the Bank and Corporation Tax Law (Pt. 11 (commencing with Sec. 23001), Div, 2, R.& T.C.; hereafter the Bank and Corporation Tax Law) imposes taxes measured by income and, in the case of a business with income derived from or attributable to sources both within and without this state, apportions business income between this state and other states and foreign countries in accordance with a four-factor formula, with certain exceptions (Secs. 25101 and 25128, R.& T.C.). That law, in general, allocates nonbusiness income from intangible property, such as interest and dividends (see Sec. 25126, R.& T.C.), to a taxpayer's commercial domicile and allocates nonbusiness income from tangible property to the physical location of the property (see Secs. 25101 and 25123 to 25127, incl., R.& T.C.). Thus, consistent with the principles set forth in *Williamette Industries, Inc, v. Franchise Tax Bd.* (1995) 33 Cal.AppAth 1242, 1246), the Bank and Corporation Tax Law distinguishes between business income that is subject to apportionment by formula, and nonbusiness income that is not subject to apportionment by formula, but, rather, is subject to allocation to either the commercial domicile of the taxpayer in the case of income from intangible property, or the physical location of the property in the case of income from tangible property. For purposes of this distinction, the term "business income" is defined as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes

income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business (subd. (a), Sec. 25120, R.& T.C.). Nonbusiness income is defined as all income other than business income (subd. (d), Sec. 25120, R.& T.C.).

Persons, corporations, or other entities that are subject to the payment of taxes under the Personal Income Tax Law or the Bank and Corporation Tax Law may utilize, in calculating that payment, various deductions and credits allowed under those laws." Generally, a deduction reduces the amount of a taxpayer's gross income that is subject to taxation, while a credit is applied against the tax liability of a taxpayer to reduce, by the amount of the credit, the taxpayer's payment obligation to the state.

Whether or not the phrase "paid for in whole or in part out of public funds" includes a situation in which a taxpayer utilizes state tax deductions or credits under the Personal Income Tax Law or the Bank and Corporation Tax Law requires an analysis of the language of subdivision (b) of Section 1720.

As discussed above, we are of the opinion that subdivision (b) of Section 1720 and the regulations that describe "public funds" comprise a comprehensive definition of (1) which payments or activities by the state or a political subdivision constitute payment "in whole or in part out of public funds," and (2) what the term "public funds" means for purposes of these payments or activities. As also discussed above, to determine the meaning of a statute, courts begin with the language in which the statute is framed and construe those words in context with provisions relating to the same subject matter *(Leroy T. v. Workmen's Comp. Appeals Bd.,* supra, at p. *438; People* v. King, supra, at p. 69). In this connection, a taxpayer's utilization of state tax deductions and credits is not expressly included within the definition of the activities by a state or political subdivision that constitute payment "in whole or in part out of public funds" in subdivision (b) of Section 1720, nor in the state regulations that define the term "public funds."

Thus, at issue is whether a court would hold that a taxpayer's utilization of state tax deductions and credits, though not expressly contemplated by that section, nevertheless constitutes the payment with public funds for purposes of subdivision (b) of Section 1720. For the reasons discussed below, we are of the opinion that a court would hold that a taxpayer's utilization of state income tax deductions and credits is not an activity that constitutes payment "in whole or in part out of public funds" for purposes of Section 1720.

" Examples of state tax deductions include a deduction for net operating losses incurred by a taxpayer (Sees. 17276 and 24416, R.& T.C.) and a deduction for trade or business expenses (Sees. 17270.5 and 24343, R.& T.C.). Examples of state tax credits include a credit in the amount of certain research and development expenses incurred by a taxpayer (Sees. 17052.12 and 23609, R.& T.C.) and a credit of up to $250 for the costs incurred by a taxpayer in constructing devices to assist disabled persons (Sees. 17053.42 and 23642, R.& T.C.).

The first issue raised by this question is whether a taxpayer's utilization of state income tax deductions and credits would constitute "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." We are of the view that a taxpayer's utilization of state income or corporate tax deductions or credits does not require nor contemplate any "payment of money or the equivalent of money" by the state or a political subdivision of the state (subd. (b), Sec. *1720).* First, a taxpayer's utilization of state income or corporate tax benefits does not involve any "payment" by the state. The term "payment," in the context of public works laws, has been defined by the courts to mean "the performance of a duty, promise, or obligation by the delivery of money or other value-the delivery of money or its equivalent" *(McIntosh,* supra, at p. *1588).* The Legislature, in enacting a statute, is presumed to have knowledge of existing judicial decisions and to have acted in the light of those decisions *(Watts v. Crawford (1995) 10* CalAth *743, 754-755).* Thus, in our opinion, the manner in which tax credits and deductions are provided to taxpayers indicates that the Legislature did not intend that a taxpayer's utilization of state income or corporate tax deductions and credits be deemed the "delivery" of money or its equivalent to a taxpayer.` Rather, a taxpayer who is eligible for a deduction or credit merely enters the amount of the deduction or credit on his or her tax return to calculate his or her tax liability. Furthermore, as discussed in Part II above, we are of the view that, for purposes of this provision, the term "money" means currency, and that the "equivalent of money" means an item that is easily convertible into currency. State income tax deductions and credits are not cash-convertible assets; they cannot be traded among taxpayers and converted into cash. Therefore, we conclude that a court would hold that a taxpayer's utilization of state income tax deductions and credits does not constitute the payment of money or the equivalent of money by the state or political subdivision for purposes of subdivision (b) of Section *1720.*

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[12] However, Sections *17052.6* and *17061* of the Revenue and Taxation Code provide for refundable state income tax credits. That is, if a taxpayer's income tax credit available under either of those laws exceeds the taxpayer's tax liability, the state will refund the excess credit to the taxpayer. In our view, these provisions are not relevant to your question, which pertains to tax deductions and credits and payment with public funds for the purposes of Section *1720,* because neither credit pertains to the activities contemplated by Section *1720,* namely, construction, demolition, repair, alteration, or installation. Section *17052.6* of the Revenue and Taxation Code, by reference to Section *21* of the Internal Revenue Code, allows a refundable state income tax credit for expenses incurred by a taxpayer for household services and medical care for dependents or persons who cannot care for themselves, that enable the taxpayer to seek and maintain gainful employment. Section *17061* of the Revenue and Taxation Code, by reference to Section *1176* of the Unemployment Insurance Code, allows a refundable state income tax credit for any excess withholdings from an employee's contributions for disability insurance.

A related issue raised by this question is whether a court would hold that a taxpayer's utilization of state income tax deductions and credits would fall within the ambit of the phrase "fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven," as used in subdivision (b) of Section 1720. As can be seen, a taxpayer's utilization of state income tax deductions and credits are not expressly included in this phrase, nor is the term "tax."" Moreover, while state tax deductions reduce the amount of a taxpayer's gross income that is subject to taxation and state tax credits reduce a taxpayer's tax liability, a taxpayer's payment of state income or corporate taxes is not, in our view, an activity that "would normally be required in the execution of the contract." In particular, the payment of state income taxes is not an obligation that arises from contract; the obligation arises under the Personal Income Tax Law and the Bank and Corporation Tax Law. Moreover, income or corporate tax payments to the state are due only if a taxpayer earns income that is taxable, and if that taxpayer has a tax liability that exceeds the amount of the taxpayer's available credits. Thus, the extent of a person's obligation to pay state income taxes is entirely dependent upon the taxable earnings of that person as defined by statute, and is not "normally required in the execution" of any contract. The fact that a person may, from his or her performance of a contract, realize an amount of taxable income is an event incidental to that contract, but the payment of taxes on that income is in no sense a "normal requirement" connected to a contractual obligation. Therefore, we conclude that a court would hold that a taxpayer's utilization of state income tax deductions and credits does not fall within the ambit of the phrase "fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven" as used in subdivision (b) of Section 1720.

Another issue raised by this question is whether a court would hold that a taxpayer's utilization of state income tax deductions and credits falls within the ambit of the phrase "credits applied against repayment obligations" as used in subdivision (b) of Section 1720. As discussed above, a state income or corporate tax deduction or credit is applied against the tax base or liability of a taxpayer to reduce, on the basis of the amount of the deduction or credit, the taxpayer's tax payment obligation to the state. As such, a state

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[13] Subdivision (b) of Section 1720 does use the term "fee" which is often used synonymously in common parlance with the term "tax." However, courts have held that there are numerous differences between taxes and fees and that they are different government charges (see *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Ca1.4th 866). As indicated above, courts hold that the Legislature, in enacting a statute, is presumed to have knowledge of existing judicial decisions and to have acted in the light of those decisions *(Watts v. Crawford,* supra, at pp.754-755). Therefore, we are of the view that the Legislature did not intend that the term "fees," as used in subdivision (b) of Section 1720, be synonymous with the term "tax."

income or corporate tax credit is not a credit applied against a "repayment" obligation to the state or a political subdivision; rather, a deduction or tax credit is applied to calculate a taxpayer's initial "payment" obligation to the state.

As discussed above, to determine the meaning of a statute, courts begin with the language in which the statute is framed and construe those words in context with provisions relating to the same subject matter (*Leroy T. v. Workmen's Comp. Appeals Bd.,* supra, at p. 438; *People v. King*, supra, at p. 69). In this regard, the term "repay" is defined as "to pay back" and "to make return payment" (Webster's Third New International Dictionary (1986), p. 1924). Thus, the plain meaning of the term "repayment" implies that, at some time, one person or entity made a payment of some kind to another person or entity, and that at some later time, the entity or person receiving the payment will recompense the original payer. In contrast, a taxpayer's utilization of a state tax deduction or credit does not involve a "repayment" by the taxpayer to recompense an earlier payment to a taxpayer by the state or any political subdivision. Rather, as stated above, a state income tax deduction or credit is a device that is used to determine a taxpayer's payment obligation to the state.

In our view, the phrase "credits applied against repayment obligations," as used in subdivision (b) of Section 1720, was intended to encompass a situation similar to that in precedential public works decision number 2000-011 (P.W. No.2000-011, Town Square Project/City of King (12/11/00))." In that decision, the director found that a project was paid for in part from public funds when a redevelopment agency applied, against a promissory note given to the agency by a developer, credits that were awarded to the developer as an incentive to entice the developer to bid on the project. The redevelopment agency deeded a parcel of real property to the developer in exchange for a promissory note from the developer. However, upon applying the incentive credits against the promissory note, the developer owed nothing for the parcel. In that circumstance, incentive credits were applied against a repayment obligation to the redevelopment agency, in the form of a promissory note, and thereby constituted payment in part from public funds. In our view, the language in this portion of subdivision (b) of Section 1720 was crafted to encompass a circumstance such as that in the City of King decision, and not a situation in which a taxpayer is eligible to utilize state income or corporate tax credits. Therefore, we are of the opinion that a court would hold that a taxpayer's utilization of state tax deductions and credits does not fall within the ambit of the phrase "credits applied against repayment obligations" as used in subdivision (b) of Section 1720.

Consistent with these conclusions is the fact that, prior to the enactment of Chapter 938, no reported court decision held, nor had any decision designated as precedential by the department found, that "paid for in whole or in part out of public funds," as used in

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[14] A letter was sent from Gary J. O' Mara, Counsel, Department of Industrial Relations to Deputy Legislative Counsel Scott Baxter, dated February 26, 2002, p, 1, stating that Chapter 938 codified precedential public works decision number 2000-011.

Section 1720, included a taxpayer's utilization of a state income or corporate tax deduction or credit. Moreover, as indicated above, the wording of subdivision (b) of Section 1720 does not provide that a taxpayer's utilization of state tax deductions and credits constitutes payment "in whole or in part out of public funds." Given the distinctions noted above, we are of the opinion that, if the Legislature had intended to expand the scope of public works and prevailing wage laws to include the utilization of state tax deductions and credits as payment in whole or in part out of public funds for the purposes of classifying a project as a "public work," language to that effect would have been expressly provided for in subdivision (b) of Section 1720.

Furthermore, the references in subdivisions (c) and (d) of Section 1720 to state income and corporate tax credits do not call for a contrary conclusion. As quoted above, paragraph (4) of subdivision (c) of Section 1720 provides, "Notwithstanding subdivision (b), paid for in whole or in part out of public funds shall not include state tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code." These sections of the Revenue and Taxation Code provide a state tax credit equal to the amount of certain costs associated with the activities of taxpayers engaged in manufacturing. Similarly, paragraph (3) of subdivision (d) of Section 1720 provides that low-income housing projects that are allocated state low-income housing tax credits under Section 12206, 17058, or 23620.5 of the Revenue and Taxation Code on or before December 31, 2003, are not subject to public works and prevailing wage laws solely by reason of Section 1720. While these paragraphs expressly exclude the specified tax credits from the ambit of subdivision (b) of Section 1720, it is our opinion that a court would not infer from these exclusions that other state tax deductions or credits utilized by a taxpayer are payments from public funds for the reason that tax deductions and credits do not meet the relevant criteria of Section 1720, as discussed above. In our view these paragraphs merely clarify that a taxpayer's utilization of these particular tax credits does not constitute payment from public funds for purposes of public works and prevailing wage laws.

Therefore, because neither the language of subdivision (b) of Section 1720 nor existing decisional law includes a taxpayer's utilization of state tax deductions and credits within the ambit of what constitutes payment "in whole or in part out of public funds," we are of the opinion that such a utilization does not constitute payment "in whole or in part out of public funds" for purposes of subdivision (b) of Section 1720.

Consequently, we conclude that the phrase "paid for in whole or in part out of public funds," as used in subdivision (b) of Section 1720, does not include the utilization by a taxpayer of state tax deductions or credits under the Personal Income Tax Law or the Bank and Corporation Tax Law.

B. The Benefits Derived by Private Construction Projects from Public Works Construction

The second part of this question concerns whether the phrase "paid for in whole or in part out of public funds," as used in Section 1720, would include the benefits derived by a wholly private construction project from the completion and operation of a separate and distinct public works construction project of streets, sewers, or other public improvements

that occurs on property that is adjacent to the private construction project. The benefits derived by private property from public improvements are not an item that is specifically provided for as a payment from public funds as defined in subdivision (b) of Section 1720 or in state regulations. However, this question raises an issue of whether these benefits constitute "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer" as used in Section 1720. Another issue raised by this question is whether these benefits constitute the "performance of construction work by the state or political subdivision in execution of the project" as used in Section 1720. It is our view, as discussed below, that the term "paid for in whole or in part out of public funds" as used in Section 1720 does not include the benefits derived by a private construction project from a separate and distinct public works construction project of streets, sewers, or other public improvements that occurs on property that is adjacent to the private construction project.

With respect to the first issue, we are of the view that the benefits derived by private property from public improvements do not constitute "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." As discussed above, the term "payment," in the context of public works laws, has been defined by the courts to mean "the performance of a duty, promise, or obligation by the delivery of money or other value-the delivery of money or its equivalent" *(McIntosh*, supra, at p. 1588). While public improvements may in some manner incidentally benefit an adjacent but wholly private construction project, this benefit does not involve the delivery of anything of value by the state or a political subdivision directly to, or specifically on behalf of, the owner or contractor of the wholly private construction project. Also, the question here involves a situation in which the public improvement project is a separate and distinct project, meaning that no interest in the public improvements vests in the private construction contractor or the owner of the private construction project. Therefore, no money or its equivalent, or any other benefit, has been directly provided to, or on behalf of, a contractor, subcontractor, or developer. Thus, we conclude that the benefits derived by private property from public improvements do not constitute "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer" for purposes of subdivision (b) of Section 1720.

Similarly, with respect to the second issue, we are of the view that the benefits derived by private property from public improvements do not constitute the "performance of construction work by the state or political subdivision in execution of the project." The question here involves a situation in which the private construction project is a separate and distinct project from the public improvement construction. Therefore, neither the state nor a political subdivision is performing any work in execution of this distinct and wholly private construction project. Therefore, we conclude that the benefits derived by private property from public improvements does not constitute the 'performance of construction work by the state or political subdivision in execution of the project."

On the basis of the foregoing discussion, we conclude that the phrase "paid for in whole or in part out of public funds," as used in subdivision (b) of Section 1720, does not include the benefits derived by a wholly private construction project from a separate and distinct public works construction project of streets, sewers, or other public improvements that occurs on property that is adjacent to the private construction project.

VI. Summary

In summary, we conclude that the phrase "performance of construction work by the state or political subdivision in execution of the project," which activity subdivision (b) of Section 1720 specifies is within the meaning of the phrase "paid for in whole or in part out of public funds," means that if the state or a political subdivision, as defined in Section 1721, engages in "construction," as defined in ordinary use and by the body of public works law, as part of a project, that construction work would constitute payment, in whole or in part, from public funds. We also conclude that the phrase "equivalent of money," as used in subdivision (b) of Section 1720, means an item that is virtually identical to currency in that it is easily converted into cash, and that nonmonetary general technical assistance provided to a private company by the Technology, Trade, and Commerce Agency pursuant to Section 15364.6 of the Government Code would not constitute the "equivalent of money."

It is our opinion, moreover, that a person or entity performing a construction project, other than a project described in paragraphs (1) and (2) of subdivision (d) of Section 1720, that is financed through the issuance of qualified small-issue industrial development bonds would be required to pay prevailing wages to workers on that project pursuant to subdivision (1) of Section 91533 of the Government Code.

We also conclude that a person or entity that receives a grant of state dollars has received public funds under Section 1720, but would not be required to comply with prevailing wage laws solely because that person or entity utilizes those state grant dollars in a trade or business. Rather, prevailing wage obligations would attach only if the grant funds are utilized for the types of work described in subdivision (a) of Section 1720 pursuant to a contract with the state or a political subdivision thereof or subcontracts that are derivative of that contract.

In addition, we conclude that the phrase "paid for in whole or in part out of public funds" as used in subdivision (b) of Section 1720 does not include a situation in which a taxpayer utilizes state tax deductions or credits under the Personal Income Tax Law or the Bank and Corporation Tax Law. Finally, we conclude that the phrase "paid for in whole or in part out of public funds" as used in subdivision (b) of Section 1720 does not include the benefits derived by a wholly private construction project from a separate and distinct public

works construction project of streets, sewers, or other public improvements that occurs on property that is adjacent to the private construction projects.

Very truly yours,

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Legislative Counsel

By [*original signed by]*
Scott A. Baxter
Deputy Legislative Counsel